4-1-1950

Constitutional Law -- Sovereign Immunity from Suit -- Waiver by Appearance -- Ancillary Jurisdiction of Federal Court

the incidents of the litigation" was applied, may also severely limit the power of Congress to regulate procedure in federal courts in diversity cases.[21] For if a procedural regulation in force in the federal courts was interpreted to affect the outcome of a suit, and such rule did not also exist in the state court, to apply the rule in the federal court in a diversity case would lead to a different result than if the suit were tried by a state tribunal.[22] This would seem to fall within the *Guaranty* principle as clearly as the situation where a state act was interpreted to affect the outcome of a suit so as to make it applicable in the federal court.

CONSTITUTIONAL LAW—SOVEREIGN IMMUNITY FROM SUIT—WAIVER BY APPEARANCE—ANCILLARY JURISDICTION OF FEDERAL COURT

Complainant sought to enforce the injunction, in a previous decree by this same federal court, restraining the assessment or collection of any taxes contrary to the terms of a valid tax exemption granted by its legislative charter from the state.[1] In the prior case, brought by this complainant, the defendant of record was the person whose duty as a state official consisted of assessing and collecting taxes, and his counsel was the Attorney General of the state. Whether each one was named and appeared as an individual citizen or in his official capacity was not clearly shown, due to the lack of uniform designation of the defendant and of counsel, in the process and the pleadings and in the opinion by the court. The present suit named as defendant the state official charged with the same duty to levy taxes, who also was represented by the Attorney General. *Held,* complaint dismissed for lack of jurisdiction of a federal court, this ancillary proceeding being one against the state[2] within the immunity from suit

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(". . . substance and procedure will become in law, as in fact, one.") 1 CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 171 (1911).

21. See Justice Holmes' dissent in Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U.S. 518, 533 (1928) (there had been an "unconstitutional assumption of powers" by the courts of the U.S.); Erie Railroad Co. v. Tompkins, *supra* at 78 "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or 'general'. . . ."

22. Fed. R. Civ. P. 23 (b) is a limitation on bringing shareholder's derivative actions. It would appear to affect a litigation as much as, if not more than the security statute involved in the instant case. Under the present decision, if the above premise is valid, it could no longer be applied by district courts unless the same rule existed in the state. *Contra:* Piccard v. Sperry Corporation, 36 F. Supp. 1006 (S.D.N.Y. 1941), *aff'd,* 120 F.2d 328 (2d Cir. 1941), *cert. denied,* 328 U.S. 845 (1946). Perrot v. United States Banking Corp., 53 F. Supp. 953 (D. Del. 1944) [23(b) is procedural, using the same reasoning of the district court opinion in the principal case, 7 F.R.D. 352 (D.N.J. 1947)].

1. Georgia Railroad & Banking Co. v. Wright, 132 Fed. 912 (C.C.N.D.Ga. 1904); *aff'd,* 216 U.S. 420 (1910).

2. The court relied on Musgrove v. Georgia Railroad & Banking Co., 204 Ga. 139, 49 S.E.2d 26 (1948) (*held,* whether defendant is named as an individual or in his

provided by the Eleventh Amendment.[3] The appearance of the Attorney General in the previous suit, on behalf of the defendant whose official conduct was sought to be enjoined, was without statutory authority at that time to thereby constitute a waiver by the state of its immunity from suit. An attempted but invalid waiver of its immunity may be attacked by the state, when the question of jurisdiction is properly raised, and the immunity bars an ancillary suit to enforce a prior decree. *Georgia R.R. & Banking Co. v. Redwine,* 85 F. Supp. 749 (D.C.Ga. 1949).

A federal court lacks jurisdiction of a suit against the state without its consent,[4] unless the state has waived the immunity by appearing in the suit as a party,[5] and thus voluntarily has submitted to the adjudication of its rights on the merits of the case.[6] The submission may have been by an intervention on the part of the state in a proceeding already in federal court,[7] or by the appearance of the Attorney General as counsel on behalf of the nominal defendant, either the state[8] or a state official.[9] But, for the federal court to have had jurisdiction thereby, the official or the counsel must have had statutory authority,[10] to enter the appearance of the state on behalf of the State,[11] such that the judgment or decree will be binding upon the State.[12] There will be no presumption of the discretionary authority

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official capacity as tax official, suit to enjoin assesssment of taxes is one against the State when founded on tax exemption contract with the State, since the State has a direct interest in the subject matter), *appeal dismissed,* 335 U.S. 900 (1949).

3. U.S. CONST. AMEND. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced *or prosecuted* against one of the United States. . . ." (Emphasis added).

3a. On appeal to the United States Supreme Court, the cause was continued for such time as would enable the appellant to assert, with all convenient speed, the plain, speedy, and efficient state remedies which the appellee argued were available. Georgia R.R. & Banking Co. v. Redwine, 70 Sup. Ct. 472 (1950). 28 U.S.C. § 1341 (1948).

4. Hans v. Louisiana, 134 U.S. 1 (1890).

5. Missouri v. Fiske, 290 U.S. 18 (1933) (intervention to seek temporary impounding of fund already in federal court, pending decision by State court of rights of private parties on which States would base tax, is not such submission as to be waiver); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906); Clark v. Bernard, 108 U.S. 447 (1883) (intervention as claimant of fund in court is waiver); Georgia v. Jesup, 106 U.S. 458 (1882).

6. See note 4, *supra;* Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916) (failure to object to jurisdiction); Puerto Rico v. Ramos, 232 U.S. 627 (1931) (petition to be made a party defendant granted over objection of plaintiff; *cf.* Ford motor Co. v. Dep't of Treasury of State of Indiana, 323 U.S. 459 (1945); *cf.* Farish v. State Banking Board, 235 U.S. 498 (1915); Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94 (D.C. Wash. 1913).

7. Clark v. Bernard, *supra; cf.* Title Guaranty & Surety Co. v. Guernsey, *supra;* Deseret v. California, 202 Fed. 94 (9th Cir. 1913); Missouri v. Fiske, *supra.*

8. Deseret v. California, *supra;* O'Connor v. Slaker, 22 F.2d 147 (8th Cir. 1927).

9. Gunter v. Atlantic Coast Line R.R., *supra;* Richardson v. Fajardo Sugar Co., *supra;* Dannuck v. Kansas State Highway Comm., 21 F. Supp. 882 (D.C. Kan. 1937) (attorneys retained by Commission); Koon v. Bottolfsen, 60 F. Supp. 316 (D.C. Idaho 1944); Ford Motor Co. v. Dep't of Treasury, *supra.*

10. Hagood v. Southern, 117 U.S. 52 (1886); see notes 8, 9, *supra.*

11. Hagood v. Southern, *supra;* Title Guaranty & Surety Co. v. Guernsey, *supra;* Koon v. Bottolfsen, *supra.*

12. Gunter v. Atlantic Coast Line R.R., *supra;* O'Connor v. Slaker, *supra.*

of the official or the counsel to do so,[13] even when there was apparently the authority to defend the suit.[14] This indicates a distinction between the authority to appear to protect the interests of the state, and authority to thereby waive the immunity of the state.[15] The distinction may be supported by a state constitutional policy that only general consent to suit shall be given; so that the Attorney General would lack a discretionary power to give individual consents to suit or waivers of the immunity.[16]

Recent cases have stated the doctrine that when a suit against the state is upon a fiscal claim, there must be a clear statutory or constitutional declaration of an intention to be suable in a federal court.[17] Accordingly the consent given will be restricted to its terms respecting persons, courts, and procedures.[18] On that basis, and in line with earlier decisions, the consent to suit was held not to include suits in other than the state courts, which were given original or appellate jurisdiction [19] or which were the only courts for which a state statute could prescribe administrative or judicial procedures.[20] The expressed principle, which would appear to extend to other suits for the *recovery* of funds alleged to be illegally obtained or withheld from the complainant,[21] is that the state has the right

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13. Ford Motor Co. v. Dep't of Treasury, *supra*.

14. *Ibid.; cf.* Deseret v. California, *supra;* O'Connor v. Slaker, *supra*.

15. Stanley v. Schwalby, 162 U.S. 255 (1896) (instruction to appear and defend the interest of the United States, meaning 'to take part in the defense of the defendant official and by formal suggestion to bring rights of United States to notice of the court,' does not authorize making United States a party defendant); Gunter v. Atlantic Coast Line R.R., *supra*.

16. Ford Motor Co. v. Dep't of Treasury, *supra; cf.* Cargile v. New York Trust Co., 67 F.2d 585 (8th Cir. 1933) (State constitution provides that State shall never be made defendant in any State courts), *cert. denied*, 292 U.S. 625 (1934); Railroad Tax Cases, 136 Fed. 233 (C.C.E.D. Ark. 1905) (same, Attorney General lacks authority to *intervene* in suit in court); Title Guaranty & Surety Co., *supra*.

17. Kennecott Copper Corp. v. State Tax Comm., 327 U.S. 573 (1946); Ford Motor Co. v. Dep't of Treasury, *supra;* Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

18. Great Northern Life Ins. Co. v. Read, *supra;* Ford Motor Co. v. Dep't of Treasury, *supra;* Smith v. Reeves, 178 U.S. 436 (1900) (condition imposed for bringing of suit must be fulfilled); Pacific Fruit & Produce Co. v. Oregon Liquor Control Comm., 41 F. Supp. 175 (D.C. Ore. 1941) (statute of consent must be strictly construed).

19. Smith v. Reeves, *supra* (official may demand that suit be tried in State court); Ford Motor Co. v. Dep't of Treasury, *supra* (specified State court); Murray v. Wilson Distilling Co., 213 U.S. 151 (1908) (review by State supreme court of adverse administrative action); Great Northern Life Ins. Co. v. Read, *supra* (review by State supreme court); Title Guaranty & Surety Co. v. Guernsey, *supra;* Deseret v. California, *supra. But cf.* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 363, 392 (1894); Interstate Construction Co. v. Univ. of Idaho, 199 Fed. 509 (D.C. Idaho 1912) (no indicated intent to exclude federal court).

20. O'Connor v. Slaker, *supra* (consent for suit in specified forms of action); Chandler v. Dix, 194 U.S. 590 (1904) (procedure in lieu of process, and taxing of costs); Great Northern Life Ins. Co. v. Read, *supra* (kind of judgment, precedence of cases).

21. *E.g.*, Murray v. Wilson Distilling Co., *supra* (creditors of state commercial enterprise); Title Guaranty & Surety Co. v. Guernsey, *supra* (unit to enforce lien on moneys due contractor, by surety on contractor's bond); Cargile v. New York Trust Co., *supra* (suit to appoint receiver to collect tolls on tollbridge taken over by State, to apply on trust deed).

to reserve to its own courts the initial adjudication of litigation directly affecting its finances.[22]

Although the state involved in these cases had no provision for consent to suit in its own courts,[23] the opinion applied the doctrine of 'clear intention' in order to determine the issue of statutory authority to waive the immunity for suit in a federal court; and in addition laid down a requirement that the consent or the authority must be given by some provisions directly related to the subject-matter of the suit.[24] The financial aspect of the instant suits may be within the meaning of the principle reserving to state courts such litigation for the recovery of monies; but the court indicated that collecting or securing a *claim* of the state does not include defending a suit to prevent the collection of taxes asserted to be due the state.[25] Thus, a statutory provision authorizing the state tax official to demand the services of the Attorney General, when necessary to secure or collect a claim of the state,[26] did not clearly show an intention to authorize those officials to waive the immunity.[27] And, the constitutional and statutory provisions which imposed on the Attorney General the duty to represent the state in all cases in any court [28] against any *claim* inconsistent with the rights of the state,[29] being general directions not specifically applicable to tax collections, did not clearly authorize the Attorney General to waive the immunity for the state.[30]

A bill for the enforcement of a decree handed down in a previous suit,[31] by the same court,[32] is ancillary either as a procedural continuation of the original suit [33] or as an exercise of the power to preserve the benefits of the decree [34] in order that justice may be done.[35] A federal court of

22. See note 17, *supra*.
23. See Musgrove v. Georgia R.R. & Banking Co., *supra*.
24. Georgia R.R. & Banking Co. v. Redwine, 85 F. Supp. 749, 752 (D.C. Ga. 1949).
25. *Ibid.* (emphasis by the Court in the opinion).
26. GA. CODE § 222 (1895).
27. See note 11, *supra*.
28. GA. CONST. ART. VI, § 10 (1877); GA. CODE § 220 (1895): "It shall be the duty of the attorney-general . . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor. . . ." The court in the instant case did not express or intimate any doubt that the Governor had not required the Attorney General to appear in the previous case.
29. GA. CODE § 23 (1895): "When *any* suit is instituted against the State, or against any person, *in the result* of which the State has any interest, under pretense of *any claim* inconsistent with its sovereignty, jurisdiction, or rights, the Governor shall, in his discretion, provide for the defense of such suit, *unless otherwise specially provided for*." (Emphasis added).
30. See note 11, *supra*. The opinion thus distinguished Gunter v. Atlantic Coast Line R.R., *supra*.
31. Cincinnati, I. & W. R.R. v. Indianapolis Union Ry., 270 U.S. 107 (1926).
32. Hume v. City of New York, 255 Fed. 488 (2d Cir. 1918); Local Loan Co. v. Hunt, 292 U.S. 234 (1934).
33. Hume v. City of New York, *supra*; Becker Steel Co. of America v. Cummings, 95 F.2d 319 (2d Cir. 1938); Brun v. Mann, 151 Fed. 145 (8th Cir. 1906).
34. Local Loan Co. v. Hunt, *supra*.
35. Hume v. City of New York, *supra*.

equity has jurisdiction of an ancillary bill, dependent upon the jurisdiction of the original suit and the decree,[36] even though the grounds of federal jurisdiction of an original suit are lacking.[37] Thus, an ancillary bill may be brought without a consent of the sovereign to suit other than the consent to the original suit;[38] and a waiver of the immunity, by an official authorized to do so, extends to an ancillary suit.[39] However, the ancillary bill must be within the terms of the statutory consent; so if the ancillary proceeding is not a procedural continuation of the original suit, then the consent does not allow the ancillary suit.[40] And in order for the appearance by an authorized state official to constitute a waiver extending to an ancillary proceeding, the State must have been party to the original adjudication.[41] The instant case, then, lays down the rule that the official must be authorized to waive the immunity, for his appearance to constitute a valid waiver of the immunity respecting an ancillary suit to enforce the prior decree.[42]

Inasmuch as there is a dearth of authority concerning the use of an ancillary bill to enforce the decree in a suit against the state, there appears to be no reason for questioning the correctness of the ruling that the state official must have authority to waive the immunity for the state. However, the more noteworthy feature of the instant case is the reasoning by which the court found that the Attorney General lacked the authority to waive the immunity from suit. The extension of the 'clear intention' doctrine from cases concerning statutory consent is in accord with the lack of distinction by the courts between such consent and waiver of the immunity by an official. But the requirement that the legislative provision giving the authority should be directly related to the subject-matter, unduly prescribes the mode in which the legislature may exercise its discretion to indicate the intention of the state to be suable in a federal court.

CORPORATIONS—DIRECTOR'S RIGHT TO ENFORCE BONDS PURCHASED AT DISCOUNT DURING INSOLVENCY OF BANKRUPT CORPORATION

Respondents, the wife, mother, and friend of directors of the debtor corporation, purchased its debenture bonds at a large discount during a

36. Cincinnati, I. & W. R.R. v. Indianapolis Union Ry., *supra;* Hoffman v. McClelland, 264 U.S. 552 (1924); Krippendorf v. Hyde, 110 U.S. 276 (1884).

37. Root v. Woolworth, 150 U.S. 401 (1893); Julian v. Central Trust Co., 193 U.S. 93 (1904); Riverdale Cotton Mills v. Alabama and Georgia Mfg. Co., 198 U.S. 188 (1905); Gunter v. Atlantic Coast Line R.R., *supra.*

38. Becker Steel Co. of America v. Cummings, *supra;* Gunter v. Atlantic Coast Line R.R., *supra.*

39. Gunter v. Atlantic Coast Line R.R., *supra;* see Great Northern Life Ins. Co. v. Read, *supra;* Ford Motor Co. v. Dep't of Treasury, *supra.*

40. Becker Steel Co. of America v. Cummings, *supra.*

41. Missouri v. Fiske, *supra.*

42. See note 24, *supra.*